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No. 791

In the Supreme Court of the United States

OCTOBER TERM, 1944

LLOYD C. DUNCAN, PETITIONER

v.

DUKE PAOA KAHANAMOKU, SHERIFF, CITY AND COUNTY OF HONOLULU

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the District Court (R. 389) is not reported. The opinions rendered in the Circuit Court of Appeals (R. 1188) are not yet reported.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on November 1, 1944 (R. 1232). The petition for a writ of certiorari was filed on December 29, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the imprisonment of the petitioner, a civilian, pursuant to a conviction in a military provost court for assault upon two marine sentries on a military reservation with intent to hinder them in the performance of their duties, in violation of a military order making such an assault an offense triable in the provost court, is valid under martial law proclaimed by the Governor of Hawaii and approved by the President under the Hawaiian Organic Act (48 U. S. C. 532).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

These are printed in the Appendix (*infra*, pp. 25–26).

STATEMENT

The petitioner was convicted on March 2, 1944, in the Provost Court for the Island of Oahu, Territory of Hawaii, for the offense of assaulting two United States Marine Corps sentries at the main gate of the Navy Yard in Pearl Harbor, T. H., with intent to hinder them in the lawful discharge of their duties, in violation of paragraph 8.01 of General Orders No 2 of the Military Governor of Hawaii, dated March 10, 1943 (R. 98–118).

Before stating the facts of the petitioner's case it may be helpful to set forth the authority under which the provost courts were established.

Establishment of martial law in Hawaii.—On December 7, 1941, after the Japanese attack on Pearl Harbor, the Governor of Hawaii issued a public proclamation stating that pursuant to Section 67 of the Hawaiian Organic Act (48 U. S. C. 532) the privilege of the writ of habeas corpus was suspended until further notice and the Territory was placed under martial law (R. 12–14). On the same day the Governor telegraphed the President that he had declared martial law and suspended the privilege of the writ, and on December 9 the President approved the Governor's action (R. 61–62).

Following the Governor's proclamation on December 7, 1941, Lt. Gen. Walter C. Short, Commanding General, Hawaiian Department, acting as Military Governor, issued a public proclamation declaring that necessary ordinances governing the conduct of the people of the Territory would be published, and that offenders would be punished by military tribunals or held in custody until such times as the civil courts could function (R. 58–60). On December 7, 1941, General Short issued General Orders No. 4, establishing a system of military courts to try civilians for violations of laws of the United States and of the Territory, and rules, regulations, orders or policies of the military authorities, by the procedures prescribed for special and summary courts martial (*White* (No. 792, this Term), R. 79–81). On

December 8, 1941, by direction of the military authorities, the civil courts were closed (R. 594, 601; *White*, R. 81). General Orders No. 29, dated December 16, 1941, authorized the civil courts of the Territory to open to a limited extent for the trial of limited classes of cases not requiring jury trials or the subpoenaing of witnesses (*White*, R. 82–85). General Orders No. 57, dated January 27, 1942, authorized the civil courts, as agents of the Military Governor, to exercise their normal functions except for jury trials, writs of habeas corpus, and other specified classes of cases (*White*, R. 86–88). General Orders No. 133, dated August 31, 1942, extended the jurisdiction of the civil courts to jury trials, and General Orders No. 135, dated September 4, 1942, enumerated the criminal offenses, involving offenses against the government or related to the war effort, in respect of which the civil courts were not authorized to exercise jurisdiction (Appendix, p. 38). From December 7, 1941, to January 30, 1943, General Orders Nos. 1 to 181, inclusive, were issued for the governing of all persons within the Territory of Hawaii (R. 46).

On February 8, 1943, the Governor issued a public proclamation providing that, although martial law and suspension of the privilege of the writ of habeas corpus were to remain in effect, the Governor and other civilian officers and agencies could resume their respective jurisdictions with regard to various governmental functions, including criminal and civil judicial

proceedings (except for criminal proceedings against members of the armed forces and civil suits against them for any act or omission in the line of duty, or criminal prosecutions for violations of military orders, unless these exceptions were waived by the commanding general in any particular case or class of cases (R. 70–74)). On the same day, Lt. Gen. Emmons, who succeeded Lt. Gen. Short as Commanding General and Military Governor, issued a public proclamation relinquishing to the Governor and other civilian officers of the Territory the functions set forth in the Governor's proclamation (R. 77–81). These proclamations, which were made effective on March 10, 1943, were issued after protracted conferences among the Governor and representatives of the Departments of War, Interior, and Justice, held for the purpose of restoring civil functions to the civilian authorities as quickly as was practicable under the circumstances (R. 74–75). The proclamations received the personal attention of the President (R. 75–76).

Pursuant to the proclamations of February 8, General Emmons issued a revised set of General Orders Nos. 1 to 14, effective March 10, 1943, and rescinded General Orders Nos. 1 to 181, issued under the prior proclamation (R. 97–234, 226). General Orders No. 2 (R. 98–118) vested provost courts and military commissions with jurisdiction to try any case or proceeding involving violation by a civilian "of the rules, regulations, proclama-

tions, or Orders of the Military or Naval authorities, or of the Military Governor of the Territory of Hawaii, or of the laws of war," and to impose punishment by fine, imprisonment, or both (R. 99–100, 47–49, 98, 118). Lesser offenses were to be tried by provost courts (R. 101), which in adjudging sentences were to be guided, but not bound, by the penalties provided by the Courts-Martial Manual, the laws of the United States, the laws of the Territory of Hawaii, and the customs of law in like cases (R. 101). The maximum punishment for violation of General Orders not containing a different provision as to punishment, and the maximum punishment which a provost court could impose was confinement with or without hard labor for a period not to exceed five years, or a fine not to exceed five thousand dollars, or both (R. 101, 104). Provost courts were authorized to admit to bail persons charged with an offense punishable by such courts (R. 104), and their procedure was to follow, so far as it was feasible, the procedure used in summary courts-martial (R. 105).

Petitioner's offense.—A penal summons from the Military Governor to the petitioner, dated and served on February 29, 1944, commanded him to appear at the provost court at Pearl Harbor on March 1, to answer the charge of violating paragraph 8.01 of General Orders No. 2, which provided that no person shall commit an assault on any military or naval personnel

with intent to resist or hinder them in the discharge of their duty (R. 365–366). When the petitioner appeared in obedience to the summons, he was asked whether he desired counsel and whether he was ready to proceed with the trial; he stated that he did not desire counsel and was ready to proceed (R. 784). The trial was adjourned until March 2 because of the absence of the Government's witnesses (R. 785). At the trial Corp. Robert Bowerman, United States Marine Corps Reserve, and Pvt. James C. Hunter, United States Marine Corps Reserve, testified to the petitioner's assault upon them on February 24, 1944, while they were on duty guarding the main gate at the Pearl Harbor Navy Yard (R. 367–377). The petitioner then testified on his own behalf (R. 378–379). The court found the charges sustained by the evidence, adjudged the petitioner guilty, sentenced him to six months' confinement, and committed him to the custody of the respondent, Sheriff of the City and County of Honolulu, for execution of the sentence (R. 379–381).

On March 14, 1944, a petition for a writ of habeas corpus was filed in the United States District Court for the Territory of Hawaii alleging that the petitioner's trial and conviction by a provost court and imprisonment were unlawful and unconstitutional in that there existed no real or apparent threat of invasion of Hawaii,

that martial law did not lawfully exist within the Territory, and that irrespective of martial law there was no military necessity for the trial of the petitioner, a civilian, by a military tribunal (R. 4–8). The respondent's return and answer to an order to show cause why a writ should not issue (R. 2, 25–38) admitted that the federal and territorial criminal and civil courts were functioning (R. 7, 27–28), but denied that the petitioner's trial and imprisonment were unlawful and unconstitutional or that imminent danger of invasion had ceased or that martial law did not lawfully exist (R. 26–29). The return affirmatively alleged that under the proclamations of the Governor and of the Military Governor, issued on February 8, 1943, the suspension of the privilege of the writ and martial law continued and the civil courts were without jurisdiction to try violations of military orders (R. 70–74). The return further alleged, on belief and on information from the military authorities, that Hawaii had at all times since December 7, 1941, been in imminent danger of attack and that the public safety required the continued existence of martial law and suspension of the privilege of the writ (R. 43–44), that the provost courts were necessary and proper for the successful prosecution of the war (R. 47) and were established in good faith and in the honest belief that military necessity required them, and that the punishment in a provost court of persons assaulting military

sentries in the performance of their duties with intent to obstruct them was not unreasonable or arbitrary (R. 54).

The petitioner's traverse, filed on April 4, 1944, denied the military necessity for the petitioner's trial by a provost court and the existence of any imminent danger of invasion, within the meaning of Section 67 of the Hawaiian Organic Act, at the time of the alleged offense and of the provost court trial (R. 384). Upon the argument on March 31, 1944, the District Court determined that a writ should issue; it was made returnable immediately and the respondent produced the petitioner in court. Thereupon the court ordered that the petitioner be released pending determination of the case on furnishing a bond of $500.00. (R. 415.) It was stipulated that the return to the order to show cause and the traverse to this return should stand as a return to the writ and as a traverse to the return to the writ (R. 484–485).

The evidence produced at the hearing before the District Court may be conveniently divided into two parts, that relating to the question of imminent danger of invasion and the necessity for martial law, and that relating to the petitioner's assault on the marine sentries and the conduct of the provost court trial.

The military situation.—The evidence bearing on the military necessity for martial law and on the question of imminent danger of invasion consisted principally of the testimony of Admiral

Chester W. Nimitz, the Commander in Chief of the Pacific Fleet and of the Pacific Ocean Areas, Lt. Gen. Robert C. Richardson, Jr., United States Army, then Commanding General of the Central Pacific Area, and Governor Ingram H. Stainback.

Admiral Nimitz testified that the Hawaiian area constituted the only base for the Navy in the Pacific Ocean at that time, and that despite daily searches a Japanese surprise carrier attack on the Hawaiian Islands was within the enemy's capabilities (R. 1073–1076). He testified that while invasion by seaborne troops in sufficient number to seize a beachhead was not probable, invasion by submarine commando raiders and espionage parties was imminent and constantly impending, as well as invasion by carrier-borne aircraft (R. 1078).

General Richardson testified that the Hawaiian Islands are within the theatre of operations of the Pacific Ocean Areas, which is an active theatre of war (R. 1011), and that the Islands constitute the apex of a bastion, composed also of Alaska and the Panama Canal, upon which the safety of the West Coast of the continental United States depends (R. 1011–1012). He reviewed the Japanese military actions which had taken place in the Territory from the beginning of the war (R. 1013–1015). He testified that the Japanese fleet was still capable of making a surprise attack upon Oahu by the use of air or undersea craft, and that the danger of this type of invasion was always im-

pending and imminent even though the Japanese might not be capable of landing a large land-based force for the purpose of seizing the Islands (R. 1030–1031). He testified that Pearl Harbor is the most attractive target for the Japanese enemy because it is the base of the Pacific Fleet, and that it was likely that Japan would take the risk of launching an attack because of the attractiveness of the target and the considerable damage which might be inflicted (R. 1016–1018, 1031–1042). He stated that the Japanese fleet had the capabilities of launching an attack on Oahu and there was danger of such a surprise attack because it was impossible to patrol the whole surface of an area as large as the Pacific Ocean and because a Japanese carrier force could move close to Oahu without detection under cover of a "cold front", a large zone of mist which is a very common weather phenomenon in the area (R. 1019). Besides the possibility of striking from carriers, the Japanese could make use of submarines by which they could approach at night, launch boats, and send parties ashore in order to secure information of great military value or to attack important installations (R. 1019–1021).

On the question of the military necessity for provost courts, General Richardson testified that the discharge of his responsibility for military security required a method of enforcement of military security regulations which was prompt and subject to his immediate control and authority, and that un-

der martial law the provost courts provided such a method of enforcement. Speedy trial and punishment were deemed important in the enforcement of martial law. (R. 1026–1030.) He testified that in carrying out his responsibilities for military security he should not be required to rely upon other agencies for the enforcement of his security measures (R. 1052), and that the failure of the civil courts to deal adequately with violations of military security orders deemed necessary by the military commander would diminish his authority and his ability to discharge his military responsibilities (R. 1057). He testified that a military trial for the offense involved here was necessary in order to uphold the authority of military sentries who are charged with important military duties (R. 1050–1051). In this case the sentries were on duty at the main gate of the Pearl Harbor Navy Yard checking the identification of persons entering the Yard and preventing disturbances at a busy period of the evening (R. 779, 798–799, 898–899).

Governor Stainback testified that in his opinion public safety did not require the suspension of the privilege of the writ, and that there was no imminent danger of invasion (R. 826) and no military necessity for the trial of civilians in provost courts for offenses other than crimes against the laws of war (R. 825–828, 898–899). Judge Albert M. Cristy of the Circuit Court of the Territory testified that he did not believe that any

reason existed except military orders for the failure of the civil courts to resume the conduct of their business within a few weeks after the Pearl Harbor attack (R. 603–608).

The provost court trial.—The petitioner testified that he did not assault the two marine sentries.[1] The testimony of the sentries, however, clearly supported conviction of the offense which was tried before the provost court (R. 802–901). The petitioner challenged (R. 530) the correctness of the transcript of the testimony in the provost court, annexed to the return (R. 367–379) because of the allegation of the petition that he was tried upon a false charge in a provost court and was tried without counsel (R. 5–6). The accuracy of the transcript was established by the testimony of the court stenographer (R. 782–798), the provost court judge (R. 942), and Corp. Bowerman and Pvt. Hunter (R. 801, 899).

Captain J. Frank Wickhem, who served as Provost Court Commissioner for the Territory of

[1] The Government objected to the petitioner's testimony on the question whether the assault in fact occurred, on the basis of the clearly established rule that the only question in habeas corpus proceedings is whether the military tribunal had jurisdiction over the offense charged (R. 507–516). The petitioner argued, however, that the evidence would show that he had not in fact violated the General Orders and therefore the provost court lacked jurisdiction (R. 507–508). Thereupon the District Court overruled the Government's objection and allowed the testimony; the Government was unwilling to permit the petitioner's testimony that he had been falsely accused and unfairly tried in the provost court to go unchallenged on the record.

Hawaii, testified about the procedure in the provost courts as follows:

After a citation is given by the shore patrol, the military police, or the civil police to the defendant, he is requested or summoned to appear at the civil police station within 48 hours for booking; the charge is drawn, signed and verified; the defendant is then brought into court, arraigned, and informed that he has the right to counsel, and can call or subpena witnesses; the trial then commences if the defendant states he is ready; the trial is conducted according to the rules of evidence; the judgments are reviewed by officers on the staff of the Commanding General who can reduce any sentence or remit the fine (R. 910–912). The provost court judges are qualified attorneys, some of whom have had experience as judges in civil courts (R. 996–1001).[2]

Termination of martial law.—The District Court on April 20, 1944, sustained the writ, and discharged the petitioner from custody on his own recognizance pending appeal (R. 402–403). Prior to entry of the decree of the court below on November 1, 1944 (R. 1232), reversing the judgment of the District Court, the President on October 19, 1944, issued Proclamation No. 2627

[2] The petitioner's trial in the provost court was before Lt. Commander Arthur L. Mundo, a member of the bar of California as well as of this Court, who served from 1932 to 1942 as a judge of the Superior Court of the State of California, until he was recalled to active duty in the Navy (R. 940–941).

(9 F. R. 12831), providing that, effective October 24, 1944, the privilege of the writ was restored and martial law terminated. The Governor of Hawaii was directed to issue a proclamation accordingly.[3]

The rulings below.—The District Court held that the Governor's proclamation of February 8, 1943, terminated the suspension of the privilege of the writ (R. 395), relying on its earlier unreported decisions in *Ex parte Glockner* and *Ex parte Seifert*.[4] It held that the Constitution of the United States and the Hawaiian Organic Act authorize martial law only when conditions of disorder disrupt the orderly performance of civil

[3] In Executive Order No. 9489 (9 F. R. 12831), dated October 18 and effective October 24, 1944, the President also directed the Secretary of War to designate the Commanding General, United States Army Forces, Pacific Ocean Areas, which includes the Territory of Hawaii, as a military commander within the meaning of the Act of March 21, 1942 (18 U. S. C. Supp. III 97a) with authority to designate the Territory or any part thereof as a military area and to prescribe regulations on such matters as blackout and curfew periods, air raid precautions, exclusion of individuals from the Territory, possession of weapons, and related matters.

[4] These cases were dismissed by the District Court as moot because the petitioners, naturalized United States citizens of German ancestry interned as dangerous, were removed to the West Coast of continental United States and released. A petition for a writ of certiorari to review the legality of suspension of the privilege of the writ and the internment of another United States citizen as dangerous in Hawaii, was denied by this Court on the ground that release of the petitioner on the mainland made the case moot. *Zimmerman v. Walker*, 319 U. S. 744.

government (R. 398); that during 1943 and thereafter the civil government was fully capable of efficient operation; that although on March 2, 1944, and thereafter the Island of Oahu may have been subject to attack, it was not subject to imminent danger of invasion by hostile forces; and that martial law did not therefore lawfully exist and the provost court possessed no authority to try the petitioner (R. 401–402).

The Circuit Court of Appeals for the Ninth Circuit, in an opinion by Judge Healy, unanimously held that the military authorities were authorized to prescribe offenses interfering with military security and to make violations triable in military tribunals, and that the petitioner's imprisonment was therefore lawful (R. 1207–1208). In view of this conclusion on the legality of imprisonment, Judges Healy and Garrecht found it unnecessary to decide whether the emergency existing in the Territory as of the time of the filing of the petition was such as to warrant the then suspension of the writ (R. 1192). Judge Wilbur, in a concurring opinion in which Judge Matthews joined, stated that the suspension of the privilege of the writ was lawful, and furnished an additional ground for reversal of the district court's order (R. 1209). In a separate opinion Judge Denman held that the petition should be dismissed because on its face it failed to show facts warranting issuance of a writ (R. 1224).

DISCUSSION

The only question decided by a majority of the judges of the court below was that relating to the jurisdiction of the provost court to try the offense with which the petitioner was charged. If this Court should, upon a review of the case, find that the military court had jurisdiction, there would be no occasion to consider any question as to the legality of the suspension of habeas corpus. *Ex parte Quirin,* 317 U. S. 1, 25. If, however, the Court should conclude that the military tribunal lacked jurisdiction and that the petitioner was therefore being unlawfully held in custody, there would no longer be any reason why the petitioner should not be released on habeas corpus. As has been stated (*supra,* p. 14), the suspension of the writ has been terminated, and the Government would not oppose discharge of the petitioner if he should be found to be entitled thereto.

The question presented, therefore, is whether trial of the petitioner by a military court for the offense of committing an assault upon marine sentries on a military reservation with intent to hinder them in the performance of their duties, in violation of a military order making such an offense triable in the provost court, was authorized by law. Section 67 of the Organic Act of Hawaii empowers the Governor of Hawaii, "in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it," to place the Territory under martial law "until

communication can be had with the President and his decision thereon made known." By the Governor's Proclamation of February 8, 1943, which was in effect when the petitioner was tried, a limited state of martial law still existed, under which military tribunals were authorized to try violations of military orders.

By empowering the Governor to place the Territory under "martial law" Section 67 of the Organic Act enables the Governor to assume temporarily for emergency purposes all the powers of the Territorial government. Martial law, in one of the accepted senses of that term, authorizes not only preventive custody of persons suspected of disloyalty or insurrection (*Moyer* v. *Peabody*, 212 U. S. 78; *Ex parte Zimmerman*, 132 F. (2d) 442 (C. C. A. 9), certiorari denied on the ground that the cause had become moot, 319 U. S. 744), but also trial and punishment of civilians by provost courts for criminal offenses, if such procedures are warranted by military necessity. See *Ex parte Milligan*, 4 Wall. 2, 129; *Ex parte Marais*, [1902] A. C. 109, 115; *In re Kalanianaole*, 10 Hawaii 29, 59–60; Richards, *Martial Law*, 18 Law Quarterly Review 133, 138–139 (1902); Fairman, *The Law of Martial Rule* (2d ed. 1943) pp. 167–173; Weiner, *A Practical Manual of Martial Law* (1940) p. 10.

Whether a particular exercise of martial law is valid depends upon the existence of a reasonable basis for the determination that military necessity

requires the exercise of martial law involved. *Sterling* v. *Constantin*, 287 U. S. 378; *Dooley* v. *United States*, 182 U. S. 222, 234; *United States* v. *Dickelman*, 92 U. S. 520, 526; *Raymond* v. *Thomas*, 91 U. S. 712, 716; *Mitchell* v. *Harmony*, 13 How. 115; *Luther* v. *Borden*, 7 How. 1. Mr. Justice Holmes stated the applicable principle as follows (*Moyer* v. *Peabody*, 212 U. S. 78, 85):

> When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process.

The President of the United States and the Governor of Hawaii acted upon the basis of a determination by the persons directly responsible for the security of Hawaii, as well as the continental United States, that, as of the time this case was tried by the military court, there still existed an imminent danger of invasion and the public safety required continuation of a limited state of martial law. While martial law was progressively relaxed, it was not until October 19, 1944, that the President felt justified in ordering complete termination of martial law in Hawaii, in view of the improved military situation in the Pacific. No one will deny that on December 7, 1941, and for some indeterminate period thereafter, martial law in Hawaii was justified by the circumstances.

The question is, at what point after December 7, 1941, did the military situation become so improved as to require complete termination of martial law?

The question has two aspects, first, of determining what the actual facts were, and, secondly, of exercising a responsible judgment on the basis of such facts. The President, the Governor, and the military authorities were peculiarly in a position to know the facts. The decisions with respect to the termination of martial law in Hawaii were made, as the record shows, only after deliberate consideration of all the relevant factors and after extended consultations among the agencies of the Government responsible for the military security of Hawaii. Future historians may be able to look back and say that those responsible for making these decisions erred on the side of caution and took too pessimistic a view of the military dangers and the necessity for minimizing such dangers by continuing some degree of martial law. The question here presented, however, is whether this Court should undertake to inquire into so much of the factual situation as is now open to judicial scrutiny, and upon the basis of such an inquiry, determine as a matter of law whether those responsible for the security of the Nation made an erroneous exercise of judgment in concluding that the military situation in the Pacific had not, prior to October 19, 1944, improved to

such an extent as to warrant the complete termination of martial law in Hawaii.

It cannot be gainsaid that, stated abstractly, the question presented is important. But its importance has been substantially diminished since the dissolution of martial law in Hawaii. The situation in Hawaii resulting from the attack on Pearl Harbor created problems of an extremely difficult and delicate character. Many conflicting interests had to be reconciled, the most important of which was the security of the Nation. Few guiding precedents were available, and the risks involved were great, no matter which course was to be taken. Fortunately, the problems have now been resolved, and the extent of the dislocations produced by the security measures adopted can be said to be rather small. There are sixteen persons presently held in custody upon convictions by military courts. The sentences of all but four of these will, with allowances for good conduct, expire during the present year. No claim is made that the petitioner was not fairly tried, and that all the basic requirements of procedural due process, including the right to counsel of his own choice and the opportunity to prepare a defense and to examine witnesses, were not satisfied.

With respect to the Territory of Hawaii, Congress has embodied in Section 67 of the Hawaiian Organic Act a legislative judgment that martial law is reasonable and constitutional in Hawaii when invasion is imminent as well as when it is

actually in progress.[5] The uncontradicted testimony of the military and naval authorities at the trial was that the Territory was, and had been since December 7, 1941, in imminent and constant danger of a large-scale bombardment from the air, as well as incursions by commando raiders and reconnaissance parties landing from submarines. It is not necessary to emphasize the crucial importance of Hawaii in the conduct of the war against Japan. As General Richardson stated, it is the apex of the bastion of defenses of the West Coast of the continental United States (R. 1012). In the words of Admiral Nimitz, Hawaii was "the only base for the Navy that we have in the Pacific Ocean at the present time" (R. 1073). The resulting necessity for using every means to secure Hawaii against invasion was increased by the fact that some part, whether large or small, of its large population of Japanese ancestry could not be assumed to be wholly loyal to the United States. The Territorial Legislature in its 1943 amendment to the Hawaiian Defense Act described the unusual situation then prevalent in Hawaii in these terms: "the existence of a state of war, the geographical

[5] The Constitutions of the Kingdom of Hawaii permitted the existence of martial law only in case of actual rebellion or invasion (Constitutions of the Kingdom of Hawaii,—for 1852, Art. 39; for 1864, Art. 37; for 1887, Art. 37). In Article 31 of the Constitution of the Republic of 1894, adopted after the *Milligan* decision, the provision was changed to permit such exercise in the case of imminent danger as well.

position of Hawaii, its importance as a strategic base for the armed forces of the United States [and] the presence of a large number of members of the armed forces and civilian war workers in addition to its normal civilian population * * *." (Act 96, approved April 30, 1943, Session Laws of Hawaii, 1943.)

In a military base of such importance the Commanding General's control over the civilian population could reasonably have been considered essential to a complete state of preparedness and thus to have been required by the public safety when invasion was imminent. If it was not unreasonable for the Commanding General to believe that the public safety required him to punish offenses interfering with the effective performance of duty by military and naval personnel, it was not improper to make such offenses triable by military courts. The civil courts had no jurisdiction to try such offenses. And, in any event, the expeditious trial of persons accused of interfering with military and naval personnel in the performance of their duties could reasonably have been considered necessary to the safety of the Territory, in order to secure the full deterrent effect on the civilian population of the knowledge that offenders would speedily be brought to trial (see testimony of General Richardson, R. 1028). Military procedure is obviously less subject to the kind of delays which may occur in a civil trial.

See King, *Legality of Martial Law in Hawaii*, 30 California Law Review (1942) 599, 611.

An inquiry into whether the public safety no longer required the continuation of a state of martial law which was admittedly valid in its inception, is one with respect to which the judicial power to review should be exercised with particular hesitation. The practical difficulties involved in an attempted judicial re-examination of the requirements of the public safety are readily apparent. An effective system of military control had to be worked out carefully and in detail. It could not be abandoned with every improvement in the military situation and restored with every unfavorable development. As the court below observed (R. 1196), "the situation was such that informed leadership would be answerable at the bar of history if it presumed to take unnecessary chances."

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
HERBERT WECHSLER,
Assistant Attorney General.
EDWARD J. ENNIS,
Special Assistant to the Attorney General.

JANUARY 1945.

APPENDIX

CONSTITUTION OF THE UNITED STATES

Art. I, Sec. 9, Cl. 2:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

THE ORGANIC ACT OF HAWAII

The Act of April 30, 1900, c. 339, 31 Stat. 141, provides in part as follows:

> SEC. 5. That the Constitution, and, except as herein otherwise provided, all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States: *Provided,* That sections eighteen hundred and fifty and eighteen hundred and ninety of the Revised Statutes of the United States shall not apply to the Territory of Hawaii.
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> * * * * * *
>
> SEC. 67. That the governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory, and whenever it becomes necessary he may call upon the commanders of the military and naval forces of the United States in the Territory of Hawaii, or summon the posse comitatus, or call out the militia of the Territory to prevent or suppress law-

less violence, invasion, insurrection, or rebellion in said Territory, and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known."

PROCLAMATIONS

PROCLAMATION 2627

TERMINATION OF MARTIAL LAW IN THE TERRITORY OF HAWAII

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA—A PROCLAMATION

WHEREAS the armed forces of the Empire of Japan having attacked and invaded the Territory of Hawaii, and the public safety requiring it, the Governor of the Territory of Hawaii, acting under the authority vested in him by section 67 of the act of April 30, 1900, 31 Stat. 153 (48 U. S. C. 532), did, by proclamation dated December 7, 1941, suspend the privilege of the writ of habeas corpus and did place the said Territory under martial law until communication could be had with the President and his decision thereon made known; and

WHEREAS communication was had with the President and his decision approving the said action of the Governor of the Territory of Hawaii was made known to the Governor on December 9, 1941; and

WHEREAS the public safety no longer requires that the privilege of the writ of habeas corpus remain suspended or that martial law continue in the said Territory:

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, acting under and by virtue of the authority vested in me by the said act of April 30, 1900, do proclaim that the privilege of the writ of habeas corpus is hereby restored and that martial law is hereby terminated in the Territory of Hawaii, and I do hereby direct the Governor of the Territory of Hawaii so to proclaim to the people of the Territory of Hawaii.

This Proclamation shall become effective October 24, 1944.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

DONE at the City of Washington this 19th day of October in the year of our Lord nineteen hundred and forty-four, and of the Independence of the United States of America the one hundred and sixty-ninth.

FRANKLIN D. ROOSEVELT

By the President:
CORDELL HULL,
Secretary of State.

BY THE GOVERNOR OF HAWAII—A PROCLAMATION

WHEREAS the Governor of Hawaii by proclamation of December 7, 1941, in the exercise of his powers under Section 67 of the act of April 30, 1900, 31 Stat. 153 (48 U. S. C. 532), suspended the priv-

ilege of the writ of habeas corpus and placed the Territory of Hawaii under martial law, which action was approved by the President of the United States of America on December 9, 1941; and

WHEREAS by proclamation dated October 18, 1944, the President of the United States of America makes known that the public safety no longer requires that the privilege of the writ of habeas corpus remain suspended or that martial law continue in the Territory of Hawaii, and proclaims that the privilege of the writ of habeas corpus is restored and that martial law is terminated in the Territory of Hawaii:

NOW, THEREFORE, I, Ingram M. Stainback, Governor of Hawaii, do hereby proclaim to the people of the Territory of Hawaii that the privilege of the writ of habeas corpus is restored and that martial law is terminated throughout the Territory of Hawaii.

DONE at Iolani Palace, Honolulu, Territory of Hawaii, this 24th day of October, 1944.

INGRAM M. STAINBACK.

EXECUTIVE ORDER NO. 9489

AUTHORIZING AND DIRECTING THE SECRETARY OF WAR TO DESIGNATE A MILITARY COMMANDER FOR THE TERRITORY OF HAWAII AND AUTHORIZING THE MILITARY COMMANDER TO PRESCRIBE SAID TERRITORY, OR ANY PART THEREOF, AS A MILITARY AREA, AND FOR OTHER PURPOSES

WHEREAS the defense of the Territory of Hawaii and the successful prosectuion of the war require every possible protection against espionage and sabotage, the maintenance of internal security,

and the efficient utilization of available facilities in that territory:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution, the laws of the United States, including the act of March 21, 1942, c. 191, 56 Stat. 173 (18 U. S. C. 97a), and Title III of the Second War Powers Act, 1942, and as Commander in Chief of the Army and Navy and as President of the United States, I order as follows:

1. I hereby authorize and direct the Secretary of War to designate the Commanding General, United States Army Forces, Pacific Ocean Areas, as the military commander within the meaning of the act of March 21, 1942. The military commander may prescribe the Territory of Hawaii or any part thereof as a military area, from which any and all persons may be excluded and with respect to which the right of any person to enter, remain in, or leave shall be subject to whatever restrictions or orders the said military commander may impose as hereinafter authorized.

2. In the military area prescribed under the authority of this order, the military commander may, whenever military necessity therefor exists and the military commander so finds:

a. Establish blackout and curfew periods and restrict and regulate the actions of all persons during such period.

b. Establish air raid precautions.

c. Regulate the conduct of enemy aliens.

d. Evacuate or exclude, and detain incident thereto, any or all persons from the military area or from any part thereof, whenever the evacuation or exclusion, or the detention incident thereto, is necessary to prevent espionage or sabotage, and the military commander so finds.

e. Regulate or prohibit possession or use of firearms or other weapons.

f. Define, for the purposes of this order, what shall constitute military service with the armed forces of nations other than the United States and require all persons who have had such military service with the armed forces of nations other than the United States to register such military service.

g. Issue regulations to assure adequate protection of the following: ports and harbors, dockage and stevedoring, barges, tugs and floating equipment, transportation of ship cargoes and passengers, and disposition of all cargoes until removed from dock areas at docks and wharves.

h. Regulate, restrict, or prohibit travel within, into, or from the military area whenever such regulation, restriction, or prohibition is necessary for military security, and the military commander so finds.

i. Whenever necessary to prevent espionage or sabotage, and the military commander so finds, regulate the publication of any newspapers and periodicals that are published in a foreign language or in dual languages, regulate, restrict, or prohibit the possession or use of radio transmission sets or the transmission of information (by any means other than newspapers) between the military area and points outside of the said area, and between the islands within the said military area.

3. Whenever the military commander finds it to be in the interests of national defense and the successful prosecution of the war, he may, to the

extent that he deems it necessary to carry out the purposes of this order, perform the functions and exercise power and authority conferred on the President by Title III of the Second War Powers Act, 1942 (50 U. S. C., app. 633) insofar as they relate to priorities and allocation of the following in the Territory of Hawaii: Ports and harbors, dockage and stevedoring, barges, tugs, floating equipment and all travel facilities; and fixing of over-all quotas to vessels of all commercial cargo.

4. Nothing in this order shall be construed to modify or revoke any of the provisions of Executive Order No. 9066, dated February 19, 1942. Any designation of the military commander and of the Territory of Hawaii or any part thereof as a military area under paragraph 1 hereof shall constitute designation of such military commander as the military commander, and of such Territory or such part thereof as a military area for the purposes of the said Executive Order No. 9066, and shall vest the military commander with the powers provided in that order.

5. Unless sooner terminated, the authority herein conferred shall expire thirty days after the cessation of hostilities between the Empire of Japan and the United States.

6. All prior Executive orders, insofar as they are in conflict herewith, are amended accordingly.

7. This order shall become effective on October 24th, 1944.

FRANKLIN D. ROOSEVELT

THE WHITE HOUSE,
October 18, 1944.

WAR DEPARTMENT,
WASHINGTON, D. C., *24 October 1944.*

Lieutenant General ROBERT C. RICHARDSON, Jr.,
Commanding General, United States
Army Forces, Pacific Ocean Areas.

DEAR GENERAL RICHARDSON: In accordance with the authority conferred on me by Executive Order No. 9489, dated October 18, 1944, issued pursuant to the provisions of the Act of Congress approved March 21, 1942 (Ch. 191, 56 Stat. 173, 18 U. S. C., Sec. 97a), I hereby designate you as the Military Commander of the Territory of Hawaii, with full power to prescribe the Territory of Hawaii or any part thereof a military area within the meaning of the Act of Congress and the Executive Order above referred to, and to exercise therein any and all of the powers conferred by that Act and the said Executive Order.

Sincerely yours,

(S) HENRY L. STIMSON,
Secretary of War.

PUBLIC PROCLAMATION NUMBER ONE

24 OCTOBER 1944.

To: The People Within The Territory of Hawaii,
And To The Public Generally:

WHEREAS, national-defense material, national-defense premises, and national-defense utilities, as defined by Section 4, Act of April 20, 1918, Chapter 59, 40 Stat. 533, as amended by the Act of November 30, 1940, Chapter 926, 54 Stat. 1220, and the Act of August 21, 1941, Chapter 388, 55 Stat. 655 (USC, Title 50, Section 104), are lo-

cated within the Territory of Hawaii, are subject to attack by the armed forces of the Empire of Japan with which the United States is at war and are subject to espionage and acts of sabotage; and,

WHEREAS, by Executive Order No. 9489 dated October 18, 1944, the President of the United States authorized and directed the Secretary of War to designate The Commanding General, United States Army Forces, Pacific Ocean Areas, as the Military Commander within the meaning of the Act of March 21, 1942, Chapter 191, 56 Stat. 173, USC, Title 18, Section 97a, and provided that the said Military Commander may prescribe the Territory of Hawaii or any part thereof as a military area within the meaning of the said Act from which any and all persons may be excluded and with respect to which the right of any person to enter, to remain in or leave shall be subject to whatever restrictions or orders the said Military Commander may impose as authorized in said Executive Order; and,

WHEREAS, the Secretary of War on 24 October 1944 designated the undersigned, The Commanding General, United States Army Forces, Pacific Ocean Areas, as the Military Commander to carry out the functions, duties and powers imposed by the said Executive Order; and,

WHEREAS, in order to secure every possible protection for said national-defense material, national-defense premises, and national-defense utilities against espionage and sabotage, to secure the maintenance of military and internal security, the efficient utilization of available facilities in the Territory of Hawaii, and to successfully prose-

cute the war, it is required by military necessity that the Territory of Hawaii be prescribed a military area within the meaning of the said Executive Order and the said Act of March 21, 1942, Chapter 191, 56 Stat. 173, USC, Title 18, Section 97a, and that the security orders hereinafter set forth be issued and made applicable to the said military area prescribed herein:

NOW, THEREFORE, I, ROBERT C. RICHARDSON, JR., Lieutenant General, United States Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General, Pacific Ocean Areas, do hereby declare and proclaim that:

1. The present situation requires as a matter of military necessity the establishment of the Territory of Hawaii as a military area, and, based upon the findings above set forth and for the purposes aforesaid, I hereby prescribe the Territory of Hawaii as a military area to be designated and known as the Territory of Hawaii Military Area.

2. The right of any person to enter, remain in, or leave the Territory of Hawaii Military Area or any part thereof designated hereafter in this Proclamation or any subsequent Proclamation shall be subject to the provisions of this Proclamation No. 1 and Security Orders Nos. 1 to 7 inclusive as hereinafter set forth which are hereby promulgated and declared effective from the date of this Proclamation, and shall be further subject to the provisions of any subsequent Proclamations, restrictions, orders, rules, regulations, or instructions which may hereafter

be promulgated by undersigned Military Commander.

In addition thereto, any person who fails to comply with or violates any provisions of any Proclamations, restrictions, orders, rules, regulations or instructions issued or adopted by the undersigned Military Commander, Territory of Hawaii Military Area, pursuant to the authority cited in the preamble of this Proclamation, applicable to the whole or any part of the Territory of Hawaii Military Area, including any district, or restricted area thereof, is subject to the penalties provided by Public Law No. 503 of the 77th Congress approved March 21, 1942, entitled "An Act to Provide a Penalty for Violation of Restrictions or Orders with respect to persons entering, remaining in, leaving, or committing any act in Military Areas or Zones." providing therein a fine of not to exceed $5,000.00, or to imprisonment for not more than one year, or both, for each offense.

If two or more persons conspire to violate Public Law No. 503 and one or more do any act to effect the object of such conspiracy, each of the parties will be subject to the penalties provided by Title 18, Section 88, United States Code.

Whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of the Military Commander of the Territory of Hawaii Military Area shall be subject to the penalties provided by Title 18, Section 80, United States Code.

In the case of an alien enemy, such persons will in addition be subject to immediate apprehension and internment.

3. Any or all persons will be ordered excluded or evacuated from the Territory of Hawaii Military Area or from any part thereof by the undersigned Military Commander whenever such evacuation or exclusion is necessary to prevent espionage or sabotage. Incident to such exclusion or evacuation such persons will be subject to detention. No person who has been ordered excluded or evacuated from the Territory of Hawaii Military Area or from any part thereof by the undersigned Military Commander, in accordance with the provisions of this paragraph, shall enter, or remain in the Territory of Hawaii Military Area or in such part thereof.

4. Nothing contained herein shall be construed as limiting or modifying the rights, powers, duties and responsibilities of the undersigned Military Commander as Commanding General, Pacific Ocean Areas, to prescribe regulations for the conduct and control of alien enemies, and the apprehension and internment of such alien enemies as are subject to apprehension and internment in the judgment of the undersigned Military Commander as Commanding General, Pacific Ocean Areas, duly authorized by the Secretary of War and pursuant to the Proclamations of the President of the United States dated December 7, 1941 and December 8, 1941.

5. It shall be the duty of every person found within the Territory of Hawaii Military Area or any part thereof, to familiarize himself with the terms of this Proclamation and the restrictions,

orders, rules, regulations and instructions hereinafter contained and which may hereafter be issued and promulgated by the undersigned Military Commander.

6. The Executive of the Military Commander, Territory of Hawaii Military Area, is hereby designated, authorized and empowered to issue the orders of the Military Commander relative to all matters relating or pertaining to functions, powers, duties and responsibilities of the said Military Commander under Executive Order No. 9489, dated October 18, 1944.

7. Unless otherwise clearly indicated in the Proclamation, restriction, order, rule, regulation or instruction in which used, the term "person" as used in any Proclamations, restrictions, orders, rules, regulations or instructions of the undersigned Military Commander shall include and hereby is defined to mean, any natural person or persons, firms, associations, trusts, corporation or corporations, or any agent, servant, employee, or representative of any of the foregoing.

ROBERT C. RICHARDSON, JR.,
Lieutenant General, United States Army;
Commanding General, United States
Army Forces, Pacific Ocean Areas;
Military Commander, Territory of Hawaii Military Area.

TERRITORY OF HAWAII
OFFICE OF THE MILITARY GOVERNOR
IOLANI PALACE

HONOLULU, T. H., *31 August 1942.*

GENERAL ORDERS
No. 133

SECTION I. DECLARATION AND FINDING.
SECTION II. OPERATION OF THE CIVIL COURTS.
SECTION III. FUTURE MODIFICATION OF THIS ORDER.

SECTION I. DECLARATION AND FINDING.—Hawaii constitutes the main Pacific outpost of the United States, and accordingly must be regarded as a fortress to whose defense the entire population of the Islands is committed. Its manpower and its economic resources must be subject to a single ultimate control. Martial law has been declared and the emergency which called it forth still prevails. The privilege of the writ of habeas corpus has been suspended and remains suspended. For all this there is authority in Section 67 of the Organic Act. The measures of military control have from time to time been modified in the light of experience and as changes in conditions have dictated. By General Orders No. 29 of December 16, 1941, the civil courts were reopened, subject to certain restrictions. It is now consistent with the public safety and the national defense that they be permitted more fully to exercise the powers normally exercised by them. They cannot, however, be allowed to interfere with the measures required by military security. It is to be understood that the relaxation herein specified is intended to return to the courts criminal prosecu-

tions and civil litigation to the extent that war conditions permit. However, this action is experimental in nature and the Military Governor reserves the right further to limit the jurisdiction of the courts or to close them entirely, if that course shall be necessary.

SECTION II. OPERATION OF THE CIVIL COURTS.—In accordance with the above declaration and finding, the civil courts are now authorized to exercise their normal jurisdiction, subject, nevertheless, to the following restrictions and limitations:

1. The privilege of the writ of habeas corpus has been and remains suspended.

2. No criminal proceeding shall be maintained against any member of the armed forces of the United States or any person employed or engaged in any occupation, business, or defense activity under the direction of the Army, the Navy, or the Military Governor.

3. No civil suit, action or other proceeding shall be maintained against any member of the armed forces of the United States or any person employed or engaged in any occupation, business, or defense activity under the direction of the Army, the Navy, or the Military Governor for any act done within the scope of such employment.

4. (a) No judgment by default shall be entered against any person who is in the Army, Navy, Marine Corps, or Coast Guard of the United States. No judgment by default shall be entered against any person employed or engaged in any occupation, business, or activity under the supervision or direction of the Military Governor, or otherwise essential to the national defense, until seven (7) days shall have elapsed after the return

day provided in the summons or by the statutes of the Territory of Hawaii. A default judgment hereafter entered shall be set aside upon the mere request of the defendant or his attorney, made either orally or in writing, to the court, or clerk thereof, in which the case was pending at the time of the entry of such judgment, if such request be so made within fifteen days after entry of such default judgment. Leave to appear or answer shall be allowed or extended for a like period of fifteen days after such default judgment shall have been set aside. In the event the defendant, after having been allowed to so appear or answer as aforesaid, shall fail to so appear or answer as aforesaid within said period of fifteen days, the court again may enter or cause to be entered the default of the defendant and enter or order entered judgment by default against such defendant. A defendant shall have no right upon his mere request to have a default judgment set aside a second time in the same case.

(b) The provisions contained in this paragraph shall apply to pending cases as well as to cases hereafter commenced or instituted.

(c) A verbatim copy of the contents of this paragraph shall be attached to the summons and served upon the defendant or defendants in cases hereinafter commenced or instituted.

5. No person referred to in paragraphs 2 and 3 of this section, with respect to whom a certificate or exemption is issued by the Military Governor or under his authority, shall be selected or listed by any jury commission as a trial juror or grand juror and no subpoena issued to require the attendance of any such person in such courts shall be valid. Based upon the requirements for labor

in the National Defense, the Military Governor will from time to time prescribe the maximum number of persons who may be summoned or held for jury service.

6. (a) No person, firm, or corporation shall institute, maintain, or prosecute any action, suit or other proceeding in any circuit or district court in the City and County of Honolulu, Territory of Hawaii, to recover the possession of any premises used for housing accommodations as defined in Section 1, Ordinance 941 of the City and County of Honolulu, Territory of Hawaii, without first having obtained an order of the Rent Control Commission of said City and County of Honolulu that said plaintiff or plaintiffs is or are entitled to the possession of said premises, and no such suit, action, or other proceeding shall be instituted, maintained, or prosecuted for the purpose aforesaid in any such said circuit or district court without such order having been first obtained by the said plaintiff or plaintiffs in such suit, action, or other said proceeding.

(b) This section shall be retroactive and shall be deemed to have been in full force and effect as of and after January 27, 1942, and shall be retroactive and applicable to any such action, suit, or proceedings, now pending in said circuit and district courts as well as to those hereafter instituted, maintained, or prosecuted in said circuit and district courts.

(c) Payments of rent shall continue to be made at the dates the rent becomes due on all housing accommodations in accordance with the agreement or procedure previously effected by the parties thereto. Landlords shall refund any unused portions of rent paid in advance to any tenants who

are duly evacuated from the Territory of Hawaii.

7. Violations of the laws of war or of proclamations, regulations, or orders of the Military Governor now in force or hereafter issued will continue to be triable by Military Commissions or Provost Courts.

8. The Military Governor may waive any restriction or limitation established by the foregoing paragraphs, with respect to any person, case, or matter, or class of persons, cases, or matters.

SECTION III. FUTURE MODIFICATION OF THIS ORDER.—This order shall be subject to modification or revocation, by the Military Governor whenever in his judgment such action is necessary.

All prior orders inconsistent herewith are hereby revoked.

SECTION IV. EFFECTIVE DATE.—This General Order is effective 12:00 noon, 2 September 1942.

By order of the Military Governor:

(signed) THOMAS H. GREEN,
Thomas H. Green,
Brigadier General, A. U. S.,
Executive.

TERRITORY OF HAWAII
OFFICE OF THE MILITARY GOVERNOR
IOLANI PALACE

HONOLULU, T. H., *4 September 1942.*

GENERAL ORDERS
No. 135

JURISDICTION OF COURTS.—1. *Criminal Jurisdiction: General.* This General Order is issued to define the criminal jurisdiction to be exercised by the Federal and Territorial courts and the courts established by the Military Governor, in accord-

ance with General Orders No. 133, this office, 31 August, 1942.

2. *Jurisdiction of Federal Courts.* The United States District Court for the Territory of Hawaii shall not exercise jurisdiction over the following crimes and offenses:

a. 10 USCA Section 1393 (Protection of uniform of the Army, Navy, Marine Corps, etc.); 18 USCA Sections 1 to 17 inclusive (Offenses against the existence of the Government); 18 USCA Section 76a and 76b (Prohibiting reproduction of official badges, identification cards, and other insignia); 18 NSCA Sections 94 to 98 inclusive (Offenses against the operations of the Government, such as enticing desertion from the Army or Navy, etc); 50 USCA Sections 31 to 36 inclusive (Espionage); 50 USCA Sections 45 to 45d inclusive (Photographing, etc., defensive installations); 50 USCA Section 101 to 106 inclusive (Wilful destruction, etc., of war or national defense material); Violations of the Selective Training and Service Act of 1940; and Federal statutes relating to Prostitution;

b. All other Federal Statutes heretofore enacted, although not hereinabove enumerated, and all other Federal Statutes hereafter enacted of the class of criminal offenses herein set forth, or relating to offenses directed against the Government, or violations in connection with the war effort;

c. Violations of the laws of war or of proclamations, regulations, or orders of the Military Governor now in force or hereafter issued;

d. Instigations, conspiracies and attempts to commit the criminal offenses hereinabove referred to.

3. *Jurisdiction of Territorial Courts.* All courts of the Territory of Hawaii shall not exercise jurisdiction over the following crimes and offenses:

a. Chapter 163, R. L. H. 1935 (Anarchistic Publications and Criminal Syndicalism); Chapter 178, R. L. H. 1935 (Disloyalty and desecration of flag); Chapter 180, R. L. H. 1935 (Disorderly House and Drunkenness); Chapter 199, R. L. H. 1935 (Military organizations); Chapter 205, R. L. H. 1935 (Riots, unlawful assemblies); Chapter 208, R. L. H. 1935 (Secret Associations); Chapter 214, R. L. H. 1935 (Vagrants, Disorderly persons, Loitering); Section 5710, R. L. H. 1935 (Places of Prostitution, etc.); Violations of any law, rule or regulation of the Territory or ordinance of any county or city and county relating to public health; assault or assault and battery on police officers or other law enforcement officers in violation of Section 5657, R. L. H. 1935; Act 128, S. L. H. 1937 (Carrying Deadly Weapons); Act 82, S. L. H., 1941 (Sabotage); Violations of traffic ordinances of any county or city and county relating to drunken driving; Violations of territorial traffic laws or traffic ordinances of any county or city and county during blackout hours as established by the Military Governor or during periods of alert as announced by the Military Governor;

b. All other Territorial statutes, county or city and county ordinances, rules and regulations heretofore enacted, or promulgated although not hereinabove enumerated, and all other Territorial statutes hereafter enacted or promulgated of the class of criminal offenses herein set forth, or re-

lating to offenses directed against the Federal or Territorial Governments, or relating to offenses in connection with the war effort;

c. Violations of the laws of war or of proclamations, regulations, or orders of the Military Governor now in force or hereafter issued;

d. Instigations, conspiracies and attempts to commit the criminal offenses hereinabove referred to.

4. *Jurisdiction over Persons.* The Federal and Territorial courts shall not assume criminal jurisdiction over the following persons except when authority to do so is first obtained from the Military Governor:

a. Members of the armed forces of the United States;

b. Persons employed or engaged in any occupation, business, or defense activity under the direction of the Army, Navy or Military Governor where the offense is committed within the scope of their employment. The determination of the status of such persons, and whether an offense is committed within the scope of employment shall rest with the Military Governor whose decision shall be final.

5. *Jurisdiction of Military Commissions and Provost Courts Retained.* Military Commissions and Provost Courts shall retain and exercise all jurisdiction and powers heretofore granted them by the Military Governor except as otherwise provided herein.

6. *Determination of Jurisdiction where Questioned.* Whenever the jurisdiction of the Federal or Territorial Courts, or Military Commissions or Provost Courts, to hear and determine any case

shall in any manner or for any reason be questioned, then in every such case, the issue of jurisdiction shall be determined by the Military Governor whose decision shall be final; and, notwithstanding any other provision of this or any other order of the Military Governor, the Federal or Territorial Court, or Military Commission or Provost Court, as the case may be, shall take, have and exercise jurisdiction in accordance with such determination and decision.

7. *Special Cases.* Notwithstanding any provision of this or any other order of the Military Governor to the contrary, the Military Governor may, whenever in his opinion such action be necessary in the public interest, exercise jurisdiction at any time over any crime or offense or person, and direct that the same be tried before a Military Commission or Provost Court.

8. *Future Modification of this Order.* This order shall be subject to modification or revocation, by the Military Governor whenever in his judgment such action is necessary.

9. *Effective Date.* This order shall take effect forthwith. Criminal cases pending before the Provost Courts and Military Commission of the class which is within the jurisdiction herein given to the Federal and Territorial courts and in which no plea has been entered shall be tried and determined by the Federal or Territorial court, as the case may be.

By order of the Military Governor:

(signed) THOMAS H. GREEN,
Thomas H. Green,
Brigadier General, A. U. S.,
Executive.

U. S. GOVERNMENT PRINTING OFFICE: 1945